IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF WASHINGTON, Petitioner,	)	Docket No. 80-365
v.	)	
EDWIN FITZSIMMONS, Respondent.	)	RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted in opposition to the State of Washington's request that this Court grant certiorari to review the decision of the Supreme Court of the State of Washington in State v. Fitzsimmons, 93 Wn. 2d 435 (1980).

The Supreme Court of the State of Washington denied the State of Washington's request for a re-hearing by order dated June 23, 1980. Respondent understands that the State of Washington filed its Petition for Writ of Certiorari in the United States Supreme Court on September 8, 1980. This raises the question, in Respondent's view, as to whether the petition was timely filed. Under the new rules of the Supreme Court of the United States, the time for filing of a petition for writ of certiorari has been reduced to 60 days from the entry of the final order or decision appealed from. In this instance, the final order entered by the Supreme Court of the State of Washington was entered on June 23, 1980. The Petition for Writ of Certiorari was filed more than 60 days from the entry of the last order. These new rules of the Supreme Court of the United States went into effect on July 1, 1980, which raises the question as to whether the new 60-day time limit would be applicable or whether the older time period of 90 days would be the applicable time period during which a petition for writ of certiorari should be filed. The

Respondent respectfully submits that in the event the 60-day time period for the filing of petitions of writs of certiorari would be operative in all cases filed after July 1, 1980 that the State of Washington has not timely filed its Petition for Writ of Certiorari.

Respondent also submits that the State of Washington has not met the requirements of Supreme Court Rule 17. The State of Washington has stated in its petition that the decision of the Washington State Supreme Court in State v. Fitzsimmons, supra, is in direct conflict with a court of last resort of another jurisdiction, citing State v. City of Tucson, 25 Arizona App. 214, 542 P.2d 407 (1979). That decision is designated by Petition to have been the decision of the Arizona Supreme Court (see Brief of Petitioner, page 3). Such a statement is inaccurate in that the decision of State v. City of Tucson, supra, is a decision of the Court of Appeals of the State of Arizona, which is an intermediate appellate court, and not the court of last resort in Arizona, which is the Supreme Court of Arizona. For this reason, the Respondent asserts that the Petitioner has not met the criteria required by Supreme Court Rule 17.

Furthermore, the decision of State v. City of Tucson, supra, is not inconsistent with the decision of State v. Fitzsimmons, supra. In State v. City of Tucson, supra, the Court of Appeals of Arizona found no denial of right to counsel. That case was factually distinguishable from the Fitzsimmons case in that in the Arizona decision, there was no denial of right to counsel. Factually what happened in the Arizona case was simply that the police did not instantaneously provide the defendant with access to counsel but delayed access until after some tests had been done and the defendant had been booked. In the instant case, the Supreme Court of the State of Washington found, as one of the grounds for its holding, that Respondent Fitzsimmons was

denied his righ to an attorney because he was precluded from speaking to any attorney at all. Other Arizona decisions also support the Respondent's contention that their law is comparable to the decision set forth in State v. Fitzsimmons, supra. In Smith v. Cada, 114 Ariz. 510, 562 P.2d 390 (1977), the Court of Appeals of Arizona sustained dismissal of the offense of driving while under the influence of intoxicating liquors because of a police action which frustrated and interfered with the rights of the defendant to obtain timely legal advice. A similar decision was reached in Smith v. Ganske, 114 Ariz. 515, 562 P. 395 (1977), and also the Court sustained a dismissal of a similar offense because of the police refusal to permit a defendant access to his attorney subsequent to arrest.

Accordingly, the Respondent asserts that the authority in the State of Arizona is comparable and consistent with the decision of the Washington State Supreme Court in State v. Fitzsimmons, supra.

Respondent, therefore, asserts that Petitioner has failed to show an inconsistency between the decision in the State Supreme Court of Washington and a decision of another state court of last resort. In the event that the Court would be inclined to grant the Petitioner's Petition for Writ of Certiorari, Respondent respectfully asserts that prior to reviewing the decision of State v. Fitzsimmons, this Court should remand the case to the Supreme Court of the State of Washington for a determination as to whether the decision in State v. Fitzsimmons was decided on procedural grounds as well as on a constitutional basis. In State v. Fitzsimmons, the Supreme Court of the State of Washington decided that the Respondent's right to access to appointed counsel was denied him because of violation of JCrR 2.11. That rule is a rule promulgated by the Supreme Court of the State of Washington which requires, inter alia, that an individual be immediately

advised of his right to appointed counsel when taken into custody and requires that "at the earliest opportunity a person in custody who desires counsel shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning counsel, and any other means necessary to place him in communication with an attorney."

Specifically, the Supreme Court of Washington stated:

> "Although Mr. Fitzsimmons requested legal advice, the provisions of JCrR 2.11(c) were not complied with. He was not provided access to a phone or with the telephone numbers of attorneys who serve as appointed counsel to indigents. See also JCrR 2.11(b)(1) which states that 'the right to counsel shall accrue as soon as feasible after the defendant is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.' Here, Mr. Fitzsimmons' right to counsel attached both because he was arrested and placed in custody and because he was charged. His rights under these rules were violated when he was denied the information and means necessary to allow him to contact appointed counsel." 93 Wn. 2d at 441.

It is the position of the Respondent that prior to reviewing this decision on constitutional grounds, this Court should remand to the Supreme Court of the State of Washington to determine whether the basis of that court's decision in State v. Fitzsimmons was based, alternatively, on State procedural grounds.

Accordingly, the Respondent respectfully requests that the Court deny the Petitioner's request for certiorari or, in the alternative, certify the case back to the Supreme Court for the State of Washington to determine whether the decision of State v. Fitzsimmons was decided on State procedural grounds.

Respectfully submitted,

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